

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Dorothy Wohletz,

Charging Party,

v.

Warners Stellian,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

The above entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, from May 16 to May 19, 1995, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota.

Charging party, Dorothy Wohletz, was represented by Donald Horton and Sonja Dunnwald Peterson, Horton & Associates, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401 and Respondent, Warners Stellian, was represented by Robert J. Foster, Foster, Ojile, Wentzell & Brever, LLC, 2855 Anthony Lane, Suite 201, St. Anthony, MN 55418. The record in this matter closed on June 12, 1995, upon receipt of the final briefs.

Based on the testimony at the hearing, the documents admitted into evidence and all documents filed of record in this case, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Warners Stellian is a family-owned corporation, originating in the 1940's, that sells home appliances. In 1993, it had two retail locations, one in Falcon Heights, (known as the St. Paul store), and one in Richfield. The business was managed by Jim Warner, Sr. until his retirement in 1993. His son Jeff Warner took over as President of Warners Stellian in 1993 and his other children are heavily involved in the business. The corporate shares of Warners Stellian are owned by the Warner family members. Major decisions are made by majority vote of the Warners at weekly meetings. The Warners often refer to themselves as partners in the business.

2. Nonna Warner Forga managed the bookkeeping department beginning in 1990. She is one of the partners of Warners Stellian and had begun working in the bookkeeping department full-time the day after her graduation from high school in 1984. She has no formal training as a bookkeeper or as a manager.

3. Dawn Gorecki was hired in the bookkeeping department on May 24, 1990, and prior to her hiring had been trained as a bookkeeper. She had computer skills from her prior employment at the time she was hired by Warners Stellian.

4. The decision was made by the Warners in 1990 or early 1991 that the bookkeeping department would change from a manual department to a computerized department. Warners Stellian initially installed the Great Plains accounting program. That computer software proved to be inadequate to meet the needs of Warners Stellian. In the summer of 1991, the decision was made to purchase new software known as MAS90. During the summer and fall of 1991, Nonna Warner Forga and Dawn Gorecki were trained on the use and application of MAS90 by Warners Stellian's accounting firm, Bouley, Heutmaker & Zibell and Co. (BHZ). One of the Warner brothers is a CPA with the firm.

5. On September 1, 1991, Charging Party Dorothy Wohletz, then known as Dorothy Sullivan, was hired as a bookkeeper. At her initial interview at Warners Stellian, Charging Party stated that she had very little computer skills, but was willing to learn. This lack of computer skills was acceptable to Warners Stellian because it was intended that Charging Party would do mostly manual bookkeeping that was required while MAS90 was being implemented. Charging Party never attended MAS90 training.

6. In late 1991 and early 1992, the Respondent continued to have problems in the bookkeeping department that were made more acute by the implementation of MAS90. Problems were experienced in accounts payable and accounts receivable. Customers were being billed for accounts that had been paid. Bills were not being sent on appliances that had been sold. Tracking and reconciling inventory became very difficult. Physical inventories showed discrepancies of thousands of dollars. Appliances were present in both stores without documentation as to how the appliances came to be there. Appliances were gone from the stores without documentation as to where the appliances went. Reports from the bookkeeping department were not completed when due.

7. As a result of the ongoing problems with inventory and other reporting issues and difficulty in implementing MAS90, in February, 1992, the Warners retained BHZ to review the bookkeeping department and offer ideas as potential solutions to improving the performance of the bookkeeping department

8. On February 27, 1992, Jeff Warner received a memorandum from Karen Russell of BHZ regarding the internal bookkeeping department and that report suggested the following problems and potential solutions:

a. Poor communications between the staff which resulted in constantly calling BHZ for support when the problem could be solved internally. The solution was that all staff be required to solve the problem before calling BHZ for support.

b. Constantly calling BHZ for problems with MAS90 software when the issues could be resolved by referring to MAS90 documentation.

- c. Overuse of the BHZ services. Items b. and c. could be resolved by requiring an authorization before BHZ was contacted.
- d. Nonna Warner did not have basic accounting knowledge and this limited her problem solving ability. Recommendation was made that if she was going to continue to be the accounting manager, she would be sent to accounting courses.
- e. There were concerns that the department was over-staffed and recommendation was to look at who spends time on what and determine who is working efficiently and who is not working efficiently.
- f. Determine whether the time is appropriate in the growth of Warners Stellian to decide whether they should hire a controller.
- g. Establish a clear line of authority as to who does what tasks in the department. Nonna Warner was concerned that she did not know who was in charge in the department.
- h. Require that the bookkeeping department be accountable for the errors that are made in the bookkeeping department.

Exhibit 11.

9. Upon receipt of this memo, Jeff Warner prepared a memorandum for Nonna Warner Forga that contained several of the points made in the BHZ recommendation. Forga was not shown the BHZ recommendation because many of the Warners considered it to be a sensitive matter. A number of family meetings were held after the receipt of the BHZ recommendation to determine what course should be taken to improve the bookkeeping department. The consensus was that no person currently in the bookkeeping department had the necessary skills to run an accounting department.

10. The decision was made by the Warners in March, 1992, that Nonna Warner Forga would have the opportunity to attempt to implement the recommendations that were contained in the BHZ report. As the department became more familiar with MAS90 and as the report was being implemented during the remainder of 1992, the department became more efficient. Critical problems remained with inventory due to the lack of problem-solving ability by anyone in the department. Nonna implemented several recommendations made in the report and this resulted in a decrease in time spent by BHZ at Warners Stellian.

11. As MAS90 became more fully implemented, in the latter part of 1992 and the beginning of 1993, each individual in the department was able to complete their required job tasks in a more efficient manner and this resulted in excess time for each of the individuals in the department.

12. Charging Party met Jack Wohletz at the wedding of one of the owners of Warners Stellian, Carla Warner Ryan, in the fall of 1991. Jack Wohletz and Charging Party began dating shortly thereafter and began living together by Spring, 1992. The relationship between Charging

Party and Jack Wohletz was common knowledge among the employees at Warners Stellian by Summer, 1992.

13. Jack Wohletz had been employed as a salesman and office person in the St. Paul Store from September, 1987, to the summer of 1989. Wohletz then met with Jim Warner and complained about his job duties and compensation. Jim Warner declined to increase Wohletz's compensation on the ground that the amount asked for would be more than Warner paid to his own sons. For six weeks, Wohletz sold appliances at Best Buy Company. He then went to work for Guyers Builder's Supply, again selling appliances. Guyers specializes in sales to contractors. Wohletz came back to work for Warners Stellian in the St. Paul store in the summer of 1990 after Jim Warner called Wohletz and asked him to return at a higher compensation rate. In 1991, Wohletz transferred to the Richfield store. John Warner and Paul Warner were the managers of the Richfield store. Wohletz had conflicts with John and Paul Warner over management style, lack of sales, and job duties. On June 8, 1992, Wohletz resigned from Warners Stellian, by letter and without notice. At that time, Wohletz went back to work for Guyers.

14. After resigning, Jack Wohletz and John Warner disputed the amount and payment of Wohletz's final paycheck. Substantial enmity remained between Jack Wohletz and John Warner after this matter was resolved.

15. Charging Party asserts that she experienced hostile treatment from June, 1992, until her termination in April, 1993. The conduct she cites as hostile treatment was a "coldness" in personal relations between herself and the Warners, scrutiny of telephone calls to determine if personal calls were being received by employees, and a reduction in "chit-chat" about nonwork topics. Duane Bannick, who was answering the phone as a salesman and office person, had been directed by the Warners to screen all the calls of persons in the bookkeeping department, including those of Nonna Warner Forga, to ensure that only calls with a business purpose were transferred.

16. In December, 1992, Nonna Warner Forga announced that she was pregnant and expecting a baby in July or August, 1993. Forga told her partners that she was unsure whether she would come back to manage the department after her baby was born. The Warners were unsure whether they would need to find a replacement for Nonna Warner Forga on a temporary or permanent basis.

17. In December, 1992, Warners Stellian held its annual Christmas party. Charging Party received an invitation to that party for herself and a guest. No one suggested that Jack Wohletz was not welcome at the party. At that party, Charging Party and Jack Wohletz announced that they were going to be married in Spring, 1993. Charging Party states that as a result of that announcement, she was ignored by John Warner when she went to speak to him. Jack Wohletz was standing next to Charging Party when this incident occurred.

18. In January, 1993, Charging Party requested a meeting with Jeff Warner. Jim Warner Sr., Jeffrey Warner, and Nonna Warner Forga were present. Charging Party identified continuing problems with Dawn Gorecki. Charging Party also stated in the meeting that she did not feel that the department was working efficiently, there was not enough work for everyone in

the department, and that the work of the department could be handled by two individuals, with some overtime. Charging Party stated "I am probably putting my own job on the line when I say there is not a need for all three people." Charging Party did not mention any hostile treatment at the meeting. She stated that she was happy with her job at Warners Stellian and hoped to continue to be working there for a long period of time.

19. From January to March, 1993, discussions were held among members of the Warner family as to whether it was time to completely reorganize the bookkeeping department. The family members reached a consensus that the work of the bookkeeping department could be handled by two persons, if the computer was used properly. Nonna Warner Forga made a recommendation that Dawn Gorecki be retained if the department was reduced to two persons. Forga believed that Gorecki's superior speed with the MAS90 program was necessary to maintain the workload of the department. Forga believed that she could take over the manual tasks performed at that time by Charging Party because she had done them before.

20. In mid-March, the Warners decided to terminate one of the persons in the bookkeeping department. Based upon Nonna Warner Forga's recommendation, the Warners concluded that Gorecki, as the senior person in the department, was the most familiar with department procedures, had better accounting skills, and better computer skills. Gorecki had been trained in the use of MAS90 and that software was now fully implemented. Charging Party was doing mainly manual bookkeeping tasks that were being eliminated by the MAS90 software. The Warners concluded that Nonna Warner Forga could do the Charging Party's assigned tasks until Forga left on maternity leave. Based on these conclusions, the Warners chose to eliminate the Charging Party's position in the bookkeeping department.

21. In March, 1993, Nonna Warner Forga announced that she had decided not to return after the birth of her child as manager of the bookkeeping department. Based on that decision, the Warners opted to replace the manager position with a controller. The controller position was to have minimum qualifications of MAS90 experience, a four-year accounting degree, and experience working as a controller at previous employers. The Warners preferred that the controller be a certified public accountant.

22. On April 4, 1993, Jeff Warner met with Charging Party and informed her that she was being terminated. He stated that the reason for the termination was the reorganization of the department. Charging Party asked twice if the reason for her termination was due to her upcoming marriage to Jack Wohletz. Jeff Warner responded each time that the only reason for her termination was the reorganization of the bookkeeping department. Nonetheless, Charging Party believed she had been terminated because of her relationship with Jack Wohletz and went home and told her family that.

23. Following the termination of the Charging Party, on April 4, 1993, and until August 8, 1993, Dawn Gorecki and Nonna Warner Forga performed all of the required work in the bookkeeping department by themselves. Neither of them put in any overtime during this four month period and reports were given to the Warners at their weekly meetings in a timely manner. Nonna Warner Forga did the manual work that the Charging Party had previously done.

24. In late April or early May, 1993, the Warners began advertising to fill the position of a controller. James Buytendorp was hired into that position. Buytendorp has degrees in finance and accounting and is a CPA. He had experience as an assistant controller and extensive MAS90 experience. The Warners expected that his educational training and employment experience would give him the necessary skills to resolve the ongoing problems in the bookkeeping department, reduce Warner Stellian's reliance on its outside accounting firm, and transform the bookkeeping department into an accounting department.

25. On July 5, 1993 Respondent opened a third store in Apple Valley, Minnesota.

26. There were two days where Nonna Warner Forga and Buytendorp worked together. From August 8, 1993 until late September, 1993, the accounting department consisted of Jim Buytendorp and Dawn Gorecki. During this period, Buytendorp spent time familiarizing himself with Warners Stellian operations and this was time spent away from the accounting department. To fill in, Duane Bannick worked in the accounting department approximately ten hours per week.

27. Personality conflicts arose between James Buytendorp and Dawn Gorecki by September, 1993. The Warners decided to terminate Gorecki, effective November 1, 1993. From November 1, 1993 to December 15, 1993, the department was run by James Buytendorp with part time assistance from Duane Bannick. Nonna Warner Forga returned on October 30th on a part time basis, with duties limited to a special project. The special project consisted of working with Buytendorp to resolve ongoing inventory problems. Nonna Warner Forga ceased working in the accounting department in December, 1993.

28. On December 13, 1993, Linda Twentyman was hired as an accountant. Linda Twentyman is a four year degree accountant who has passed two portions of the CPA examination. She had experience with payables. Buytendorp and Twentyman, with approximately ten hours of assistance per week from Duane Bannick, operated the accounting department until March 1, 1994.

29. From April, 1993, to March, 1994, Warners Stellian experienced a 60% increase in gross sales. In March, 1994, Warners Stellian hired Charles Jones as a temporary employee through an accounting temporary service. Jones worked on an as needed basis until he became a permanent employee in July, 1994. Jones' job duties were solely data entry and general computer skills. Jones had no experience in bookkeeping.

30. By the time the inventory control problems were resolved, Buytendorp had added month-end statements and year-end statements to the accounting department's responsibilities. Both of these functions are accounting functions and beyond Charging Party's skills.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction herein and authority to take the action ordered under Minn. Stat. §§ 14.50 and 363.071.

2. The Respondent, Warners' Stellian, is an "employer" for purposes of Minn. Stat. § 363.01, subd. 17.

3. During her employment with the Respondent, Charging Party was a single woman. At the end of her employment, she was about to be married. That, however, does not bring her within the class of persons protected by the Minnesota Human Rights Act against discrimination on the basis of the identity or actions of a spouse or former spouse.

4. Charging Party was qualified for the position as Respondent's bookkeeper.

5. Charging Party was not subjected to disparate hostile treatment by Respondent. Charging Party was terminated by the Respondent when her position was eliminated.

6. There is no credible evidence that Charging Party was discriminated against because of the identity or actions of her soon-to-be spouse.

7. Charging Party has failed to establish a *prima facie* case of marital status discrimination by a preponderance of the evidence under the McDonnell Douglas test.

8. Respondent has presented a nondiscriminatory rationale for the Charging Party's termination.

9. Charging Party has not established by a preponderance of the evidence that Respondent's proffered rationale for her termination is merely a pretext for discrimination.

10. Charging Party's marital status was not a factor in the termination.

Based upon the foregoing Conclusions of Law and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Charge of Discrimination of the Charging Party, Dorothy Wohletz, is hereby DISMISSED.

2. Charging Party's motion for attorney's fees for failure to negotiate in good faith is DENIED.

Dated: July ____, 1995.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped, 12 Tapes.

MEMORANDUM

The Charging Party alleges that Respondent discriminated against her on the basis of her marital status in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1 (2)(b) and (c). Two methods of proof are available to show discrimination, direct and indirect. Direct proof could consist of express statements or other evidence identifying the reason for an employment action as motivated by impermissible discrimination. Indirect proof consists of evidence of disparate treatment between members and nonmembers of a protected class.

In analyzing disparate treatment cases brought under the Human Rights Act, Minnesota courts apply principles developed by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978). In McDonnell Douglas, the United States Supreme Court established a three part analysis for adjudication of Title VII cases consisting of a *prima facie* case, an answer and a rebuttal. In Danz, the Minnesota Supreme Court explicitly adopted this analysis for disparate treatment cases brought under the Minnesota Human Rights Act. 263 N.W.2d at 398-99.

In order to prevail in a disparate treatment case, a charging party has the initial burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. Second, if the charging party establishes a *prima facie* case, a presumption is created that the employer unlawfully discriminated against the charging party and the burden shifts to the defendant to present evidence of some legitimate, nondiscriminatory reason for its actions. Third, if the defendant meets this burden, the charging party then has the opportunity to prove by a preponderance of the evidence that the defendant's reasons were a pretext for discrimination. Id.

The Charging Party claims that while employed by Respondent she was subjected to a hostile environment and was eventually terminated on account of her marital status. The Minnesota Human Rights Act forbids discrimination on account of marital status.

. . . it is an unfair employment practice:

(2) For an employer, because of . . . marital status,

(b) to discharge an employee; or

(c) to discriminate against a person with

respect to hiring, tenure, compensation, terms,

upgrading, conditions, facilities, or privileges of

employment.

Minn. Stat. § 363.03, subd. 1 (2)(b), (c). In 1988, the legislature amended the Minnesota Human Rights Act to include a definition of marital status:

“Marital status” means whether a person is single, married, remarried, divorced, separated, or a surviving spouse and in employment cases, includes protection against discrimination on the basis of the identity, situation, actions or beliefs of a spouse or former spouse.

Minn. Stat. § 363.01, subd. 24 (emphasis added). Thus, the legislature specifically intended to protect individuals from being discriminated against on the basis of their spouse’s identity, situation, or actions.

Prima Facie Case of Discrimination

A *prima facie* case of marital status discrimination generally consists of the following factors:

1. The employee is a member of a protected class;
2. The employee was qualified for her position;
3. The employee was denied the opportunities despite her qualifications;
4. Similarly situated employees who were not of the protected class were given the opportunities.

See Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986).

The Charging Party in the present case has not provided evidence sufficient to establish a *prima facie* case of marital status discrimination. The Charging Party was qualified for her position as a bookkeeper for the Respondent, as that position was constituted before the reorganization, and she was terminated, unlike the others in the bookkeeping department. However, she is not a member of a protected class. She is alleging discrimination based upon the identity or actions of her fiancée. But, as set forth above, Minn. Stat. § 363.01, subd. 24, specifically defines marital status discrimination to include protection against discrimination on the basis of the identity, situation, and actions or beliefs of a spouse or former spouse. The statute does not apply to fiancées. Even the fact that the Charging Party was terminated shortly before her marriage does not appear to be sufficient to bring her within the protection of the language of the statute.

As the last element of a *prima facie* case, Charging Party compares her situation to that of the complainant in Minnesota Department of Human Rights v. Moorhead State University, 455 N.W.2d 79 (Minn. App. 1990). In that case a woman who was terminated due to gender established a *prima facie* case of sex discrimination by demonstrating that she was a member of a protected class; she was discharged from a position for which she was qualified; and the employer assigned a nonmember of the protected class (a male) to do the same work.

There is a significant difference between the situation in Moorhead State and the situation here. Any female could have filled the position and eliminated the *prima facie* case of discrimination in Moorhead State. There is only one person who was engaged to Jack Wohletz

and therefore only that one person, under Charging Party's analysis, could be hired into the Charging Party's position in the bookkeeping department. The McDonnell Douglas analysis does not require such an absurd result. Rather, in cases such as this, the appropriate final element of a *prima facie* case would appear to be that there is some evidence that the employer harbors some improper animus or prejudice toward the spouse or that the spouse is a member of a protected class. Cybyse v. ISD No. 196, 347 N.W.2d 256, 261 (Minn. 1984). For this reason as well, Charging Party has failed to establish a *prima facie* case of discrimination based on marital status. Nonetheless, the Administrative Law Judge will complete the remainder of the McDonnell Douglas analysis.

Legitimate Business Reason

The employer may rebut the employee's *prima facie* case by articulating some legitimate, nondiscriminatory reason for its actions. The Minnesota Supreme Court has set out the standards for such reasons as:

The reason must be offered by admissible evidence, be of a character to justify a judgment for the defendant, and must be clear and reasonably specific enough to enable the plaintiff to rebut the proffered reason as pretextual.

Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 711 (Minn. 1992).

Charging Party acknowledges that the Respondent articulated a legitimate rationale for terminating Charging Party, a department reorganization. Charging Party maintains that Respondent has failed to articulate a rationale for Warner family members failing to remain friendly with the Charging Party. Charging Party cites incidents at a Christmas party as evidence of "hostile disparate treatment." The MHRA prohibits discrimination in employment, but it cannot mandate a happy work environment. The record amply demonstrates that the bookkeeping department was experiencing difficulty throughout the period Charging Party was employed there. The decision to reorganize will be discussed under the analysis of pretext. Respondent is not obligated to offer a legitimate business purpose for being less friendly with an employee when difficulties arise.

Pretext

Charging Party maintains that the reasons given for terminating her are pretext for Respondent's marital status discrimination. Charging Party asserts that indirect proof can meet the Charging Party's burden on this issue since "an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." Haglof v. Northwest Rehabilitation Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries Inc., 856 F.2d 1054, 1059 (8th Cir. 1988).

Charging Party also points out that mixed discriminatory and nondiscriminatory motives on the part of an employer are sufficient to support a finding of discrimination. Anderson, 401 N.W.2d at 80. Under a "mixed motive" analysis, the employee need only show that it is more likely than not that his or her protected status was a discernible, discriminatory and causative factor in the employer's adverse employment action. Id. at 81, 417 N.W.2d at 623.

Respondent actually reorganized its bookkeeping department. The suggestion of reorganization came from outside Warners Stellian and arose before there was any knowledge of a relationship between Charging Party and Jack Wohletz. The first suggestion that the bookkeeping department may be overstaffed came from the same outside report. Charging Party herself expressed the opinion that the work to be performed by the bookkeeping department could be performed by two people, instead of three. With Warners Stellian relying upon the MAS90 computer program, greater efficiency was achieved in the bookkeeping department between June, 1992, and April, 1993. Charging Party was the least familiar with the MAS90 system.

Since Gorecki had the most ability with the MAS90 system, the Warners had to choose between displacing a family member employed in the family business or displacing someone outside the family. When choosing between retaining a family member and a person outside the family the MHRRA does not require the nonfamily member be retained. Respondent found Nonna Warner Forga's abilities in the bookkeeping department fit the job requirements of Charging Party's position. The other employee in the department had more computer ability than either Forga or Charging Party. There is no evidence that the Charging Party's impending marriage to Jack Wohletz had any influence on the decision to terminate the Charging Party.

There is no doubt that Charging Party is an experienced and qualified bookkeeper. However, the overall performance of the bookkeeping department was inadequate. The performance of the bookkeeping department improved as the MAS90 system was fully integrated into the bookkeeping system used by Warner Stellian. The efficiencies experienced as MAS90 was implemented did not eliminate Warners Stellian's needs to improve the department to handle reports that could only be generated by an accounting department. The Warners timed the reorganization to coincide with Nonna Warner Forga going on maternity leave. At that time she was replaced by Jim Buytendorp as a controller. Upon her return from maternity leave, Forga was performing only a special project of great concern to the business for a period of two months. Forga is currently working for Warners Stellian as a clerk, outside the accounting department. After the change to a controller, the nature of the department changed from bookkeeping to accounting. This change enabled Warner Stellian to perform far more sophisticated functions than Charging Party's skills would allow. Between Charging Party and Gorecki, Charging Party had the least computer skills. Under these circumstances, it is both logical and reasonable for the Respondent to seek a new person to run the bookkeeping department and retain Gorecki for the computer work. These facts do not support a conclusion that Respondent's reasons for terminating Charging Party are pretextual.

Charging Party cites the circumstances surrounding the termination of Dawn Gorecki as further evidence of pretext by Respondent. Respondent cited personality conflicts as the reason for terminating Gorecki, and did not mention the reorganization. Inconsistent rationales for actions can certainly support a finding of pretext. What Charging Party has failed to do is identify what relevance any action concerning Gorecki has to Charging Party's case. There is no evidence that Gorecki was married (or engaged to) a former Warner Stellian salesman now working for a competitor. Gorecki's termination does not support a finding of pretext. In fact, she was replaced by an accountant, which supports the fact that Respondent was, indeed, reorganizing and upgrading the old bookkeeping department.

Charging Party relies most heavily on her testimony that Jeff Warner admitted the marital status of Charging Party was a motivating factor in the decision to terminate her. Jeff Warner testified to his own statements during the conversation Charging Party relies upon. The Judge has carefully considered the testimony of both witnesses and finds Warner's testimony to be more credible. In the conversation between Charging Party and Warner, Charging Party repeatedly asked if her marriage to Jack Wohletz was the reason for the termination. Warner repeatedly denied that her marriage played any part in the decision. Charging Party had already convinced herself that she was being terminated because of whom she was marrying and did not allow herself to hear what she was told.

Charging Party maintains that her version of events is entitled to more weight because she related her recollection, approximately a half an hour later, to Jack Wohletz and her children. Charging Party asserts that this is an excited utterance under Minn. R. Evid. 803(2); a present sense impression under Minn. R. Evid. 801(d)(1)(D), and helpful to establish the Charging Party's credibility. Charging Party cites State v. Christopherson, 500 N.W.2d 794, 798 (Minn. Ct. App. 1993), as supporting the use of such evidence. However, as found above, the Charging Party believed her marital status to be the reason for her termination and was going to relate that as the reason no matter what she was told by Jeff Warner. The preponderance of the evidence is that the Warner family, not just Jeff Warner, had decided at a meeting prior to April 4, 1993, that Charging Party would be the one that would have to be terminated for the reasons previously discussed. Nonna Warner Forga made the recommendation and testified that it had been a family decision. Dawn Gorecki was informed of the decision prior to Charging Party being terminated. If Jeff Warner or the family were going to terminate Charging Party because of her relationship with Jack Wohletz, they would not have waited almost nine months to do so.

The other evidence cited by Charging Party as showing pretext is not substantial or contradicted by other evidence. All the telephone calls of the bookkeeping department were screened to eliminate personal calls, including calls to Nonna Warner Forga. "Coldness" from family members is readily attributable to the problems experienced by the bookkeeping department, rather than Charging Party's relationship to Jack Wohletz. John Warner's actions at the Christmas party, even if we accept Charging Party's view, were inconsequential. The great weight of the evidence in this case supports Respondent's version of most of the facts. The Warners appreciated the job that Charging Party did, but when it became necessary to upgrade the bookkeeping department and reorganize it, it was reasonable to let Charging Party go and keep a family member and a person who was better on the computer.

Charging Party has not proven that her marital status was any factor in Respondent's decision to terminate her, either by direct proof or indirect proof. Therefore, the Charge of Discrimination in this matter must be dismissed.

Charging Party has also moved for attorney's fees in connection with Respondent's failure, in its view, to negotiate in good faith at a mediation session. Respondent appeared at the mediation session, but apparently refused to counter Charging Party's first demand with an offer of its own. Since Respondent did appear at the mediation session and since either party may withdraw from mediation at any point in time, it seems inappropriate to consider whether any sanctions should be imposed. To do so would require an examination of the Respondent's

thought processes and negotiating strategy. To make such an inquiry and to impose sanctions would have a chilling effect upon the mediation process. It does not appear that Charging Party was attempting to delay the process. Charging Party's request for attorney's fees must be denied.

S.M.M.